In the High Court of Uttaranchal, at Nainital.

A.O. No. 1470/2001

1- Superintending Engineer
Upper Ganga Canal Modernization
Circle –I Roorkee.

2- Executive Engineer, Upper Ganga Canal
Modernization Division -1, Roorkee.

3- U.P. State through its Secretary, Irrigation
U.P. Civil Secretariat,
Lucknow. ....Appellants.

Versus

M/S T.R. Gupta, Contractor Ltd.
Upper Ganga Canal Modernization
Project, Post Office Box No. 90,
Roorkee, Registered Office 12-A/B,
Gandhi Nagar, Jammu through
Sri V.K. Gupta, Director M/S T.R.
Gupta Contractor, Registered Office
12-A/B, Gandhi
Nagar Jammu .....Respondent.

Sri J.N. Mathur Learned Additional Advocate General, for the Appellants/State of U.P.
Sri Lok Pal Singh, learned counsel for the respondent

Hon'ble P.C. Verma,J.
Hon'ble B.C. Kandpal, J.

This appeal has been filed by the State of U.P. impugning the award dated 8-9-1997 made by the Arbitrator and the said award being made Rule of the Court by the District Judge, Haridwar, vide order dated 21-5-2001passed in Misc. Case No. 29 of 1977.

2- The appeal has been pressed on only one ground that the Arbitrator, viz. Sri B.N. Asthana misconducted himself in continuing as Arbitrator after his retirement, as his appointment as an Arbitrator was made by virtue of office. Sri Asthana was appointed Arbitrator while he was working as Chief Engineer and in the capacity of

Chief Engineer he was appointed as Arbitrator, therefore, the appointment of the Arbitrator was ex-officio.

3- Now we proceed to examine this contention of the appellant.

4- The arbitration clause-52 is given in the agreement, which reads as under:-

> "52 ARBITRATION:
> All disputes or differences in respect of which the decision is not final and conclusive, shall be referred for arbitration to a sole arbitrator appointed as follows:
> Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of one officer from the list who shall then be appointed as the sole arbitrator. If contractor fails to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. It the Chief Engineer fails to send such a list within thirty days, a stipulated, the contractor shall sent a similar list to the Chief Engineer within fifteen days. The Chief Engineer shall then select an officer from the list and appoint him as the sole arbitrator within fifteen days. If the Chief Engineer

fails to do so the contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the sole arbitrator shall be final and binding on the parties thereto. The arbitrator shall determine the amount of costs for arbitration to be awarded to either parties.

Performance under the contract shall continue during arbitration proceedings and payments due to the contractor by the owner shall not be withheld, unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and in case of awards amounting to Rs. 1.00 Lakh and above, such awards shall state reasons for the amounts awarded.

Neither party is entitled to bring a claim to arbitration if arbitrator has not been appointed before the expiration of thirty day s after defect liability period."

5- A perusal of the aforesaid clause shows that three names have to be sent by the Chief Engineer of the rank of the Officer of Superintending Engineer or of the superior rank and out of which one shall be appointed as sole Arbitrator on the choice of the parties concerned.

6- Here the name of Sri B.N. Asthana, who was chief Engineer, not connected with the affairs of the agreement, was chosen by both the parties for appointment as Arbitrator. The Chief Engineer Sri B.N. Asthana was accordingly appointed Arbitrator and the

dispute was referred to him. Sri B.N. Asthana superannuated on completion of superannuation age on 30-6-1997. On the date of his superannuation, i.e. 30-6-1997, Sri Asthana ceased to be the Arbitrator, in view of the arbitration clause, which provides for appointment of an Officer, as an arbitrator, by virtue of his office. Sri Asthana after his retirement ceased to be an Officer by virtue of his office, therefore, his continuance as an Arbitrator, after his superannuation was contrary to the provisions of agreement clause quoted above. Therefore, Sri Asthana misconducted himself in making the award and this fact was also ignored by the District Judge, while making the award Rule of the Court.

7- In view of above, the appeal is allowed and the impugned award dated 8-9-1997, made by Sri B.N. Asthana and the order dated 21-5-2001 passed by the District Judge, Haridwar, making the impugned award Rule of the Court, are set aside. No order as to costs.

8- In the present case the Arbitrator had entered into reference while old Arbitration Act was in operation, therefore, the Chief Engineer, Upper Ganga Canal Modernization Circle-I, is directed to re-name an Arbitrator to enter into arbitration proceeding in the matter, after the date of superannuation of Sri B.N. Asthana, in accordance with law.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

Dated: 15-07-2006

ISB